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# In the Supreme Court of the United States

OCTOBER TERM, 1958

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WIRL TELEVISION COMPANY, PETITIONER

*v.*

UNITED STATES OF AMERICA, FEDERAL COMMUNICATIONS COMMISSION, ET AL.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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BRIEF FOR THE UNITED STATES AND FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

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### OPINIONS BELOW

The opinion of the court below (Pet. App. A) is reported at 253 F. 2d 863. Two of the three underlying decisions and orders of the Federal Communications Commission are reported at 22 F.C.C. 342 and 22 F.C.C. 1039; the third has not been officially reported but is unofficially reported at 11 Pike & Fischer, Radio Regulation 533.

### JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit, affirming the

action of the Commission, was entered on March 27, 1958. Rehearing was denied on May 5, 1958. The petition for a writ of certiorari was filed on July 31, 1958. The jurisdiction of this Court rests on 28 U.S.C. 1254 (1) and 47 U.S.C. 402(j).

## QUESTIONS PRESENTED

1. Whether the Commission's action, reassigning television channels in the Peoria and Davenport-Rock Island-Moline areas of Illinois and Iowa in order to improve the opportunities for service among a greater number of stations in those areas, comports with Section 307(b) of the Communications Act.

2. Whether the Commission's action in reassigning such television channels is otherwise reasonable and proper under the public interest standard of the Communications Act.

3. Whether the Commission, having granted petitioner a conditional construction permit for Peoria Channel 8 which provided that the Commission might without further proceedings substitute another channel as a result of pending rule-making proceedings, was nevertheless required by Sections 303(f) and 316(a) of the Communications Act to accord petitioner a full evidentiary hearing prior to making such substitution.

## STATUTES INVOLVED

The pertinent provisions of the Communications Act of 1934 (48 Stat. 1064, as amended, 47 U.S.C. 151, *et seq.*) are set forth in the appendix to the petition, pp. 7a-9a.

STATEMENT

The Federal Communications Commission on March 1, 1957, after full rule-making proceedings, amended Section 3.606 of its Rules, comprising a nationwide allocation of television channels, by transferring a very high frequency (VHF) channel 8 from Peoria, Illinois, to the Tri-City area of Iowa and Illinois (Davenport-Rock Island-Moline) and by adding ultra high frequency (UHF) channels 25 and 31 to those already available in Peoria (22 F.C.C. 342, 22 F.R. 1489). As a result of this action, Peoria—which previously had been assigned one VHF channel and three UHF channels (one of which was reserved for non-commercial educational use)—was now assigned five channels, all in the UHF portion of the television band, of which one remained reserved. At the same time, the Tri-City area—previously assigned two VHF channels on which stations were operating and a number of UHF channels on which no station had ever operated—was now provided with a third commercial VHF channel.

The action of the Commission, in shifting VHF and UHF channels in the Peoria and Tri-City areas, was one of some nine actions taken on the same date in rule-making proceedings instituted on June 26, 1957, for the purpose of improving opportunities for competition among a greater number of stations in individual communities by deleting VHF channels in established UHF markets and/or by adding VHF channels in predominantly VHF markets.[1] These proceedings stemmed

[1] Another of these rule-making actions involving channel reassignments in Springfield, Ill., St. Louis, Mo. and Terre Haute, Ind. is now pending before the Court on petition for a writ of certiorari in *Sangamon Valley Television Corp.* v. *United States, et al.*, No. 235, this Term.

from a general allocation proceeding, terminated on June 26, 1956 (21 F.R. 4958), in which the Commission concluded that pending a study of the feasibility of moving all television broadcasting to the UHF portion of the radio spectrum, competitive opportunities in a limited number of individual communities might be enhanced without substantially impairing television service therein by eliminating the intermixture of VHF and UHF channels in the same community and making some communities all UHF and others, in effect, all VHF. This determination, in turn, was based upon the Commission's conclusion in its June 26, 1956, Report and Order that the disparity between UHF and VHF channels was such that whereas the former could compete successfully with other technically equal UHF channels and provide the viewing public with satisfactory service, direct competition by VHF channels either foreclosed successful UHF operation or seriously jeopardized its continuance.[2]

As a result of this finding that direct competition between VHF and UHF channels was unworkable, the Commission faced a serious problem. Because of the scarcity of VHF channels (12 in number), expansion of the nation's television service is dependent upon discovering some effective way to use the 70 UHF channels. In allocating television channels throughout the nation in 1952, the Commission had believed it was feasible to achieve this end by intermixing VHF and UHF assignments in the same community. Having

[2] The inequality between the two types of channels and the preference of networks, advertisers, and audiences for VHF lies primarily in the facts that UHF transmission covers a smaller area in some terrains and UHF reception requires either a special set or set conversion.

been proved wrong by experience, the Commission gave consideration in its June 26, 1956, Report and Order to other means of assuring an adequate national competitive television structure. The Commission determined that any effort at nationwide "deintermixture," *i.e.*, to make some communities all VHF, others all UHF, would not be a feasible solution. It felt that, in view of the limited number of areas in which UHF was established, a serious public hardship would result from any widespread enforced changeover and that, in view of terrain factors, many rural areas were necessarily dependent on VHF at the existing stage of television equipment development. It concluded that a long range program of shifting all commercial television to the UHF portion of the spectrum might be the best solution to the problem. However, since effectuation of any such plan would require considerable further study and time,[3] the Commission decided that, pending any long range measure, it would take interim action to alleviate the situation and to provide greater television service in a limited number of individual areas where this might be feasible, and it set forth general criteria for determining what areas would be considered appropriate (13 Pike & Fischer, Radio Regulation 1571, 1582).

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[3] Although the Commission decided not to institute any formal rule-making proceeding until after it had an opportunity to study the results of intensive research into the matter by both Government and industry, it has been instrumental in establishing the Television Allocation Study Organization (incorporating representatives of the broadcast stations, both UHF and VHF, the national networks, the electronic manufacturing industry, and the educational broadcasters) and has cooperated fully in its technical studies of the allocation and equipment problems.

In the Peoria rule-making proceeding, the Commission concluded that the public interest would be served by deleting VHF Channel 8 from Peoria, adding it to the Tri-City area, and assigning UHF Channels 25 and 31 to Peoria. The Commission found that the Peoria area was predominantly UHF with several UHF stations providing service to the public, that the terrain was satisfactory for UHF propagation, that the vast majority of sets were equipped for UHF, that additional UHF channels in the lower portion of the spectrum were available to replace VHF Channel 8, that no significant number of people would lose service if that channel were replaced with UHF channels, and that the channel shifts would insure more effective competition among a greater number of stations in Peoria (R. 1005). The Commission also found that the Tri-City area was predominantly VHF, that there was little chance of additional television service in that area unless a VHF channel were to be added, and that Channel 8 would afford a much-needed third local outlet (R. 1005-1006).

On June 26, 1956, when the Peoria rule-making proceeding was instituted, mutually exclusive applications were pending before the Commission in hearing status, including one filed by petitioner for the VHF channel proposed to be deleted in Peoria.[4] On June 29, 1956,

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[4] In addition to Peoria, there were three other communities with respect to which the Commission had initiated rule making to delete a VHF channel while mutually exclusive applications for the channel were pending before the Commission in hearing status: Springfield, Illinois; Hartford, Connecticut; and New Orleans, Louisiana. As in the case of Peoria, the Commission subsequently awarded conditional grants to the winning VHF applicants in these comparative proceedings during the pendency of the rule-

the Commission granted a construction permit for VHF Channel 8 to petitioner, subject to the conditions that no construction could commence under the permit until further order of the Commission in the rule-making proceeding, and that the Commission might "without further proceedings, substitute for Channel 8 such other channel as may be assigned to Peoria, Illinois, instead of Channel 8 in the rule-making proceeding now pending" (R. 1089). The conditional grant was made at that time because of the Commission's belief that, even though the permit issued might never become effective, it was nevertheless in the public interest to inform the competing applicants as to the Commission's choice among them so that they could plan their future actions accordingly (R. 1089).[5]

On July 30, 1956, petitioner petitioned the Commission to reconsider and vacate the conditions attached to its construction permit. The Commission on May 17, 1957, subsequent to its decision in the rule-making proceeding to delete VHF Channel 8, denied petitioner's petition for reconsideration and modified its construction permit for Channel 8 to specify operation on UHF Channel 25.

On appeal, the court of appeals unanimously affirmed the Commission's actions. The court held that the Commission's underlying findings of fact were supported

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making proceedings. See *Sangamon Valley Television Corp.*, 11 Pike & Fischer, Radio Regulation 783, 813-814 (pending before the Court on petition for certiorari. No. 235, this Term); *Travelers Broadcasting Service Corp.*, 12 Pike & Fischer, Radio Regulation 689, 806e; *Loyola University*, 12 Pike & Fischer, Radio Regulation 1017, 1114.

[5] Thus, in Peoria, the losing applicant in the comparative hearing applied for and received a construction permit for one of the new UHF channels, while the case was before the Court of Appeals (see brief of intervenor WMBD, Inc., in the court below).

by substantial evidence, and that the channel reassignments were neither beyond its authority nor an abuse of discretion (Pet. App. A, p. 6a).

The court stated (Pet. App. A, p. 6a):

> The charge of arbitrariness is not well taken. The long range goal of the Commission was to encourage UHF, and removal of potential VHF competition is a rational choice of means to achieve this goal. The short range, or "interim" goal, was to "improve the opportunities for effective competition among a greater number of stations." It was not arbitrary to conclude that the goal would be better approached in Peoria by allotting it four technically equal UHF channels, rather than one superior VHF channel and two inferior UHF channels.

With respect to petitioner's complaint that it received, not the VHF channel it wanted but a UHF channel which it did not want, the court found no error, pointing out that "this situation is a consequence of the Commission's exercise of its rule-making power and its acknowledged authority to impose the conditions which were contained in the grant of the VHF channel 8 permit" (Pet. App. A, p. 6a). Finally, the court considered and rejected without discussion various other contentions raised by petitioner in its briefs and argument to the court, as constituting "no basis for reversing the action of the Commission" (Pet. App. A, p. 6a).

1. Petitioner's contention (Pet. 13-21) that the reassignment of VHF Channel 8 from Peoria to the Tri-City area is violative of Section 307(b) of the Communications Act rests on the misconception that this section requires some specific distribution of VHF channels as such. Section 307(b) merely provides that "the Commission shall make such distribution of . . . frequencies . . . among the several States and communities as to provide a fair, efficient, and equitable distribution of *radio service* to each of the same" (emphasis added). The Commission here determined that Peoria would be provided with a greater amount of television service if it had four technically equal UHF channels rather than one competitively superior VHF channel which would seriously affect the ability of the existing UHF stations to continue in operation and virtually preclude the development of any fourth commercial station. The Commission also found that the Tri-City area, with two established VHF stations, could only obtain a third service through the addition of a new VHF channel, and that the assignment of any number of UHF channels to the area would be of no practical consequence. In deciding to reassign Channel 8 upon the basis of these determinations, the Commission did not replace the standard of Section 307(b) with any novel doctrine of "equalizing competition" to protect particular competitors (R. 1005-1006; 22 F.C.C. 352). Rather it took cognizance of the fact, established in the general rule-making proceeding, that the effect of competition between the two different types of channels was to curtail sharply the amount of television service actually received by the

public in any community where they were intermixed. The objectives of Section 307(b) and the Commission's present action are therefore the same: the distribution of frequencies in the manner best calculated to provide the greatest amount of actual television service to the communities involved. Accordingly, as the court below correctly concluded (Pet. App. A, p. 6a), there is "no basis for saying that the Commission's decision was beyond its authority."[6]

2. Petitioner's further contention (Pet. 21-27) that the Commission, in deleting VHF channels from Peoria and Springfield, Illinois, has arbitrarily discriminated against one area of the country, is factually inaccurate. On March 1, 1957, when the Peoria and Springfield cases were decided, VHF channels were also deleted from Elmira, New York (22 F.C.C. 307), and Hatfield, Indiana (22 F.C.C. 390). More recently, on April 4, 1958, the Commission deleted two VHF channels from Walla Walla, Washington (16 Pike & Fischer, Radio Regulation 1636). Furthermore, the

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[6] There is also no basis for petitioner's assertion (Pet. 14, 20) that the court below ignored the Section 307(b) issue. While the decision does not mention the section in terms, its penultimate paragraph clearly considers the essential points in petitioner's argument on this score. In any event, the final paragraph disposes of petitioner's "other contentions" as being without basis. See also *Sangamon Valley Television Corp.* v. *United States*, 255 F. 2d 191 (C.A.D.C.), pending on petition for certiorari, No. 235, this Term, where the court expressly disposed of a similar Section 307(b) argument. Nor does the decision here conflict with the opinion of this Court in *Federal Radio Commission* v. *Nelson Bros. Bond & Mortgage Co.*, 289 U. S. 266, or *Federal Communications Commission* v. *Allentown Broadcasting Co.*, 349 U. S. 358, both of which, insofar as they are relevant to the instant case, stand solely for the proposition that, in weighing the assignment of a frequency to one of two communities, the service needs of each must be taken into consideration.

Commission on March 1, 1957, tentatively deleted VHF channels in Evansville, Indiana, and Fresno, California, but, by virtue of Section 316 of the Communications Act, must accord outstanding permittees, who possess unconditioned construction permits, public hearings before these actions can be made final (22 F.C.C. 382 and 365).

In any event, the fact that only a limited number of areas may present appropriate circumstances for interim action by the Commission to provide greater service within the criteria set forth in the Commission's Report and Order of June 26, 1956, does not make such action arbitrary or capricious. *Securities & Exchange Commission* v. *Chenery Corp.*, 332 U. S. 194, 202-203; *Coastal Bend Television Co.* v. *Federal Communications Commission*, 234 F. 2d 686, 689-690 (C.A.D.C.); *Jacksonville Journal Co.* v. *Federal Communications Commission*, 246 F. 2d 699, 701-702 (C.A.D.C.). The Commission's refusal to remove VHF channels in other communities is attributable, as the court of appeals found,[7] to the different factual circumstances prevailing in those areas, *e.g.* such factors as terrain, population patterns, number of people who would lack adequate service if the channel were removed, etc.[8] In the instant case, the court of appeals, after careful scrutiny of both

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[7] See *Springfield Television Broadcasting Corp.* v. *Federal Communications Commission*, Case Nos. 14050 and 14051, decided June 19, 1958; *Winnebago Television Corp.* v. *United States*, Case No. 14086, decided July 2, 1958.

[8] Petitioner's evidentiary challenge (Pet. 11, n. 17, 26-27, 39-40) to the Commission's findings that the Peoria terrain is suitable for UHF propagation, and that no significant number of people would lack adequate service if two additional UHF channels were substituted for the one VHF, raises only an issue of fact which the court below resolved adversely to petitioner.

the record and the factors underlying the Commission's decision, found an "adequate legal and factual basis" for the Peoria-Tri-City reassignments and rejected petitioner's "charge of arbitrariness" as "not well taken" (Pet. App. A, p. 6a). Petitioner's renewal of that charge here presents no substantial issue warranting further review by this Court.

3. Equally insubstantial as a basis for certiorari is petitioner's related suggestion (Pet. 25-26, 33-38), also made before the court below, that Peoria was picked for special consideration by the Commission because of some undisclosed improper reason, or because of undue pressure by the Senate Interstate and Foreign Commerce Committee and/or Senator Kerr. Apart from stating that the Senate Committee (upon which Senator Kerr did not sit) held hearings with respect to the UHF-VHF problem, and that a UHF licensee (in which Senator Kerr was a stockholder) filed formal pleadings with the Commission,[9] petitioner does not here—and did not before the court below—support its serious charge of Senatorial and Commission misconduct. The court of appeals "considered" petitioner's unsubstantiated accusation and found "no basis for reversing the action of the Commission" (Pet. App. A, p. 6a). Viewing the lack of substantiation against the manifest reasonableness of the channel reassignments, we submit that the court of appeals did not err.

4. Petitioner's final claim (Pet. 27-32), that the Commission was required to accord it a full evidentiary hearing prior to deleting the VHF and substituting a UHF channel, likewise has no merit. No such

[9] Contrary to petitioner's implied statement (Pet. 32), no pleadings were signed or filed by Senator Kerr personally.

requirement flows from Sections 303(f) and 316(a) of the Communications Act since petitioner never received any outright grant of the VHF channel, but, instead, a permit with an express condition that the Commission might substitute another channel "without further proceedings" (R. 1089). The Commission's "acknowledged authority to impose the conditions which were contained in the grant of the VHF channel 8 permit" (Pet. App. A, p. 6a) was properly sustained by the court below. *Regents* v. *Carroll*, 338 U. S. 586, 600; *Woodmen of the World Life Insurance Co.* v. *Federal Communications Commission*, 105 F. 2d 75, 78 (C.A.D.C.) certiorari denied, 308 U. S. 588. Petitioner's long-time status as an applicant in the Channel 8 comparative proceeding does not alter the fact that no mere applicant has any special rights under either Section 303(f) or 316 of the Act.[10] *Federal Communications Commission* v. *WJR, The Goodwill Station*, 337 U. S. 265, 272; *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U. S. 134; *Coastal Bend Television Co.* v. *Federal Communications Commission*, 234 F. 2d 686 (C.A.D.C.). The circumstance that petitioner received a channel different from that which it sought is without consequence. *Civil Aeronautics Board* v. *State Airlines*, 338 U. S. 572, 575-578.

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[10] Petitioner's argument with respect to Section 2 of the Administrative Procedure Act (5 U.S.C. 1001(e)) was not raised before the court of appeals and is not appropriately before this Court. Furthermore, the argument does not advance petitioner's position, since if the conditional award was void for procedural deficiency, petitioner had no permit of any kind and no greater right than any other applicant to be heard on the channel reassignments.

## CONCLUSION

The decision below is correct, no important issue calling for further review by this Court is presented, and there is no conflict of decisions. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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